

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 59 OF 1989

Mahadeo Hariba Kumbhar,
residing at village & Post Akluj,
Tal;uka Malshiras, Dist.Solapur. Appellant.

Versus.

1. Vishwanath Hariba Kumbhar,
2. Suresh Vishwanath Kumbhar,.
3. Vilas Vishwanath Kumbhar,
4. Shivdas Hariba Kumbhar,
5. Vasant Shivdas Kumbhar,
6. Udhav Hariba Kumbar,
7. Laxmikant Udhav Kumbar, Minor
by his guardian, Udhav Hariba,
Kumbhar, Respondent No.6 herein
8. Ramling Hariba Kumbhar
9. Malkarjun Ramling Kumbhar,
minor, by his guadian Ramling
Hariba Kumbhar, Respondent No.8
hereinabove.
All residing at & Post: Akluj,
Taluka Malshiras, Dist.Solapur. Respondents.

Shri S.M.Railkar i/by Shri G.R.Rege for the Appellant.

None for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 13th April, 2005.

ORAL JUDGMENT.

1. This Second Appeal was admitted on 23rd February
1989 by passing the following order:

"Advocate for the Appellant is heard. S.A. admitted - the substantial question of law being whether the District Court erred in holding that a partition had taken place."

I have accordingly heard the learned Counsel appearing for the Appellant on the aforesaid substantial question of law.

2. The Appellant is the original Plaintiff. He filed a suit for partition and separate possession of various lands described in the plaint as well as house properties. The original Defendants Nos.1, 4, 6 and 8 are the real brothers of the Appellant/Plaintiff. The Defendants Nos.2, 3, 5, 7 and 9 are the sons of real brothers of the Appellant. The suit was contested on various grounds. One of the contentions was that there was an earlier partition in which the parties were placed in possession of their separate shares. Reliance was placed on a Will dated 6th December 1972 executed by the father Hariba. Reliance was also placed on deeds of relinquishment executed by the Appellant as regards the house properties. The learned trial Judge partly decreed the suit. The learned trial Judge held that the suit property excluding the share of the deceased Hariba

in Survey No.754 is Hindu Joint Family property. The will was held as established and it was held that the will was valid to the extent of the share of deceased Hariba in respect of survey No.754. Therefore, decree for partition came to be passed by the trial Court. An Appeal was preferred to the District Court by the original Defendants in which the decree has been set aside and the suit for partition has been dismissed.

3. The learned Counsel appearing for the Appellant submitted that the Judgment of the Appellate Court is perverse inasmuch as there is no evidence whatsoever of the earlier partition placed on record. He submitted that there was no partition by metes and bounds. He submitted that in any event the decree for partition as regards the house property could not have been set aside.

4. I have considered the submissions of the learned Counsel for the Appellant. The Appellate Court in an elaborate Judgment has dealt with the plea of earlier partition. The Appellate Court has referred to the oral and documentary evidence on record. Reliance is placed on an application made by the deceased father along with his sons to the Talathi which is signed by Hariba and all his sons including the Appellant. There is a

reference to partition in the said Application and the details of lands allotted to the different sharers are also reflected in the said application. The learned trial Judge held that there is no reference to some of the suit lands in the said application. The Appellate Court after examining the application at Exh.125 held that there is a reference to the division of all the suit properties save and except the property known as Sarati land. The Appellate Court has recorded a finding that Gangubai, the mother was given the said Sarati land which was situated in different Taluka. As the said land was not within the jurisdiction of Talati to whom the said application was made there is no reference to the said land in the said application. The learned Appellate Court referred to the admission made by the Appellant himself about the partition in the year 1957. He admitted his signature on Exh.125 and he stated that the joint family properties were referred to in the said application. Considering the documentary evidence and admission of the Appellant, the Appellate Court has accepted the theory of partition. The finding of the Appellate court as regards the earlier partition is a finding of fact based on legal evidence on record.

There is no perversity in the said finding.

5. The Appellate court has referred to the registered

deeds of relinquishment executed by the Appellant relating to house property. According to the case of the Appellant the said deeds were executed only because his first wife had filed a suit for maintenance and for ensuring that the decree for maintenance which was likely to be passed could not be executed. Considering the fact that deeds of relinquishment were duly registered, the Appellate Court has held that the Appellant cannot claim any right, title and interest in the property which the subject matter of the said deeds.

6. The Appellate Court has dealt all the contentions raised in the Appeal. Though there is no detailed discussion about the will executed by the deceased Hariba, in paragraph 22 of the Judgment, the Appellate Court has recorded a general agreement with the findings recorded by the trial Court as regards the legality and validity of the will. By the will the properties of the deceased Hariba were given to the original Defendants Nos.2 and 8.

7. No interference is called for with the said findings of fact. Even assuming that some other view is possible to be taken on the basis of the evidence on record, it is not permissible to do so in a Second Appeal under section 100 of the Code of Civil Procedure, 1908.

8. There is no merit in the Appeal. The same is dismissed with no order as to costs.

Judge.